United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1468

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United States Court of Appeals

For the Second Circuit

Docket No. 74-1468

(T-3378)

THOMAS I. FITZGERALD, Public Administrator of the County of New York Administrator of the Estate of HAGEN PASTEWKA, Deceased, and MONICA PASTEWKA, Individually,

Plaintiffs-Appellants,

—against—

TEXACO, INC. and TEXACO PANAMA, INC.,

Defendants-Appellees.

and Consolidated Cases.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS-APPELLEES' BRIEF

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The Issues Presented for Review

1. Did the District Court properly apply the principles of *forum non conveniens* to the factual situation presented to it? Yes.
2. Did the District Court abuse its discretion when it dismissed these actions? No.

Statement of the Case

A. The nature of the case.

This litigation arises out of the collision on January 11, 1971 in the English Channel between the M/V PARACAS and S/T TEXACO CARIBBEAN and the alleged subsequent allision

on January 12, 1971 by the M/V BRANDENBURG with the hulk of the Panamanian Flag vessel, TEXACO CARIBBEAN, as it lay on the bottom of the English Channel near the Mid-Varne Buoy within 12 miles of the English Coast and involves the following consolidated actions:

(1) Twelve actions commenced on various dates in December, 1972 and January, 1973 by the Public Administrator of the County of New York on behalf of the representatives of deceased German seamen aboard the M/V BRANDENBURG against Texaco Inc. and Texaco Panama Inc.

(2) An action commenced on or about January 9, 1973 by the Owners of the M/V BRANDENBURG against Texaco Panama Inc.

(3) An action commenced on or about January 10, 1973 by the Owners of cargo laden on board the M/V BRANDENBURG at the time of the alleged allision against Texaco Panama Inc.

In addition to the above-described actions which are the subject of this appeal, the following related actions are pending:

(a) *In England:*

(1) An action commenced on May 16, 1972 by the Owners of cargo laden on board the M/V BRANDENBURG against the Owners of the M/V PARACAS, the Owners of the S/T TEXACO CARIBBEAN and the Corporation of Trinity House.

(2) An action commenced on May 18, 1972 by the Owners of the S/T TEXACO CARIBBEAN against the Owners of the M/V PARACAS.

(3) An action commenced on December 7, 1972 by the Owners of the M/V PARACAS against the Owners of the S/T TEXACO CARIBBEAN.

(4) An action commenced on January 19, 1973 by the Owners of the M/V BRANDENBURG against the Corporation of Trinity House.

(5) An action commenced on or about December 29, 1972 by the Owners of cargo laden on board the M/V PARACAS against the Owners of the S/T TEXACO CARIBBEAN.

6) An action commenced on or about January 10, 1973 by the Owners of additional cargo laden on board the M/V BRANDENBURG against the Owners of the S/T TEXACO CARIBBEAN.

(b) *In the United States District Court, District of Delaware:*

(1) Twelve actions commenced on or about January 9, 1973 by the heirs and representatives of deceased German Seaman aboard the M/V BRANDENBURG against Texaco Inc. and Texaco Panama Inc. These twelve actions are virtually identical to the twelve actions pending in this Court.

B. Proceedings and disposition in the Court below.

The defendants herein made a motion on March 2, 1973, for an order dismissing the actions on the ground, amongst others, of *forum non conveniens* (A 58a)*. Following a full and complete hearing on the matter, the Magistrate, to whom it was assigned, submitted his report dated January 23, 1974 (A 360a), recommending that all actions be dismissed on certain stipulated conditions and the plaintiffs remitted to the more convenient and available forum in England.

On March 26, 1974, the United States District Court for the Southern District of New York, Honorable Charles

* References to the Appendix to this Brief are indicated by inclusion of the letter "A", to the Brandenburg's Brief by the letter "B" and to the Death Claimants' Brief by the letters "DC".

M. Metzner issued its memorandum order (A 379a) confirming the Magistrate's report and ordering the actions dismissed. On March 28, 1974, the District Court entered its Judgment and Order (A 380a) dismissing the actions.

Thereafter all of the plaintiffs below appealed from the District Court's final order (A 382a and 384a).

C. Statement of Facts Relevant to the Issues.

These fourteen consolidated actions were brought to recover for the total loss of the BRANDENBURG, loss of her cargo and loss of life to some of her crewmembers, following her negligent allision with the wreck of the TEXACO CARIBBEAN in the Dover Straits, English Channel at 0730 hours on January 12, 1971.

1. Texaco Panama Inc. (hereinafter "TEXPAN") was at all material times a Panamanian corporation with its principal place of business in Panama and was the sole owner of the TEXACO CARIBBEAN, a tank vessel registered under the laws of the Republic of Panama (A 63a, 73a).

2. At all material times the TEXACO CARIBBEAN was managed, operated and controlled by Texaco Overseas Tankship Limited (hereinafter "TOT"), a British corporation, having offices at London, England and Monte Carlo, Monaco (A 73a, 76a).

3. At no time has Texaco Inc. (hereinafter "TEXACO") ever owned, operated, controlled or had a proprietary interest in the TEXACO CARIBBEAN, nor at any of the times mentioned in the complaints was it the charterer of the vessel or the owner of any cargo aboard said vessel (A 94a-95a). Texaco has no connection with this matter whatsoever other than the fact that it was served with process herein.

4. That upon information and belief, at all times mentioned in the complaints herein the M/V PARACAS was owned and operated by Naviera Maritima Fluvial, S.A.,

(hereinafter "NAVIERA"), a Peruvian corporation with offices at J. R. Rufino Torrico 873, Lima, Peru. Naviera does not maintain an office in the United States and is not a party to the litigation here in the United States (A 63a) although it is a party to the litigation pending in England (A 82a).

5. The Corporation of Trinity House (hereinafter "TRINITY HOUSE") was and is a British corporation with offices at Tower Hill, London EC3, England, and was and is the owner of the vessel SIREN. Trinity House does not maintain an office in the United States and is not a party to the litigation here in the United States (A 63a, 77a) although it is a party to the litigation pending in England (A 82a).

6. On January 11, 1971, at approximately 0405-0410 hours, the Peruvian vessel PARACAS collided with the TEXACO CARIBBEAN in the English Channel, Dover Straits within 12 miles of the English Coast. Following the collision, the TEXACO CARIBBEAN broke in two. The forward section sank almost immediately while the stern section did not sink until approximately 1408 hours that afternoon (A 77a).

7. TOT's London office was advised almost immediately of the collision and it began making necessary arrangements, to handle the casualty, e.g., sending personnel to scene and in addition, advising Trinity House the Admiralty, etc. (A 72a, 326a).

8. In connection with the steps taken by TOT in handling this matter, it should be noted that TOT had the necessary authority, without reference to New York or anywhere else to take all necessary steps to engage the services of anyone who might be required, i.e., salvage tugs, etc. (A 326a, 328a).

9. At approximately 0752 hours, Trinity House dispatched its vessel SIREN to the scene of the casualty where

it arrived at about 1630 hours and moored in the immediate vicinity as a warning to other ships to keep clear. The SIREN was displaying a warning signal of three green lights at this time (A 77a-78a).

10. In addition, the Admiralty was broadcasting numerous navigation warnings over its radio stations located at North Foreland and Niton (A 78a).

11. Thereafter, at 0730 hours, the following day, January 12, 1971, the German Flag vessel BRANDENBURG negligently allided with the stern section of the TEXACO CARIBBEAN and sank immediately (A 78a).

12. Prior to the sinking of the BRANDENBURG, crewmembers aboard British fishing vessels in the area observed the approach of the BRANDENBURG in the vicinity of the SIREN and after the sinking picked up the bodies of the survivors and the bodies of deceased seamen from the BRANDENBURG and brought them to Folkstone, England, where autopsies and an inquest were held (A 78a, 84a).

13. As a direct result of the above-described casualties, numerous suits were commenced in England, including one by the Owners of the BRANDENBURG against Trinity House and several by the BRANDENBURG's cargo interest (A 82a).

14. None of the beneficial claimants, nor any of the surviving members of the crews of any of the vessels are citizens of or reside in the United States (A 63a-64a, 377a).

15. While all concerned parties are before the Courts in England and are represented by counsel in England, at least two essential parties (Naviera and Trinity House) are not present in the United States and cannot be impleaded in the present actions thereby preventing the Courts of the United States from rendering complete relief in the matter and forcing defendants to litigate in two jurisdictions 3,000 miles apart (A 66a, 85a).

ARGUMENT

POINT I

The District Court properly applied the principles set forth in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1957) to the factual situation here present and found most compelling reasons for dismissing these actions.

The doctrine of *forum non conveniens*, originally developed in admiralty, *The Belgenland*, 114 U.S. 355 (1885), was most clearly enunciated and set out in the landmark decision of *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1957). In that decision, the Supreme Court set forth all the applicable principles and reviewed in detail the factors it considered relevant (see 330 U.S. at 507-512). Those factors are:

1. The private interest of the parties.
2. The relative ease of access to sources of proof.
3. The availability of compulsory process for the attendance of unwilling witnesses and the cost of obtaining the attendance of willing witnesses.
4. A possible view of the premises if appropriate to the action.
5. Questions of enforceability of judgments.
6. All other practical matters that make a trial easy, inexpensive and expeditious.
7. Relative advantages and obstacles to a fair trial.
8. Factors of public interest:
   - A. Administrative difficulties in congested centers of litigation.
   - B. Local interest in having localized controversies decided at home.

C. Advisability of deciding cases in the forum where they arise and whose law will be applied.

9. Plaintiffs' choice of forum.

10. Plaintiffs' vexation, harassment or oppression of the defendant by inflicting expense or trouble not necessary to plaintiffs' own right to pursue their remedy.

The *Gulf Oil* case reflects two basic considerations underlying the doctrine: first, the actual convenience of the litigants and their witnesses, and second, the absence of any interest of the forum in the controversy. In general, these two considerations are entirely complementary because the parties can most conveniently litigate the controversy in an interested forum.

In making its decision in this matter, the District Court, recognizing that Gulf Oil was the leading case on the issues presented, set out the factors to be considered (A 364a) and then proceeded to analyze the factual situation presented in light of those factors (A 377a). In this regard, it is interesting to note that, contrary to the assertions made in Brandenburg's brief (B 18-19), the Magistrate accepted neither parties version of the events in reaching his decision (A 372a, 377a). The Magistrate clearly set forth in his report the facts as stated by each of the parties (A 364a) and without accepting either version pointed out that:

> "While the parties have expressed differences on many matters which may go to the merits of the action, *certain matters, many of which are obvious, stand out in bold relief.* The disaster took place 12 miles off the English coast even though not strictly in England but in international waters. None of the beneficial claimants, nor any of the surviving members of the crews of any of the vessels, reside in the United States. The employees and personnel of

TOT, whose testimony will be vital, as well as the records, are in or near England. The employees and personnel of Trinity, whose testimony will be vital, as well as its records, are in England. While all of these persons, and other persons, may be subject to compulsory process so as to take their deposition the deposition of witnesses is obviously a poor substitute for live testimony.

While plaintiffs have referred to the testimony of Smit-Tak as important their personnel are located in Holland. The contention that the conduct of defendants after the wreck was directed from New York has been sharply attacked by defendants; in any event the action viewed as a whole seems to have little if any contact with New York and whatever contact it may possibly have is strongly outweighed by all the other circumstances." (Emphasis supplied)

Nowhere in either Brandenburg's or Death Claimants' brief are any of these findings challenged or controverted or any attempt made to suggest a cognizable "reason for transporting this suit to New York." (Cf. 330 U.S. at 510). See *Fitzgerald* v. *Westland Marine Corp.*, 369 F. 2d 499, 501-502 (2nd Cir. 1966), a case similar to the matter herein where this circuit dismissed numerous foreign seamen's claims brought in the same name as the Public Administrator herein against an alleged New York shipowner, Japanese shipbuilder and Canadian stevedore.

Applying the *Gulf Oil* factors (as did the Magistrate) in the subject controversy, it is quite evident that:

(1) the interest of all parties concerned, including the public, clearly point to England as the appropriate forum;

(2) New York (and in fact the United States) is without any identifiable interest in, or connection to, the controversy; and

(3) the plaintiffs' attorneys have imported this litigation into New York in disregard of every established principle relating to the appropriate and convenient choice of forum.

A. The private interest of the parties.

All of the real parties in interest on whose behalf these suits were commenced are foreign nationals having no contact with this jurisdiction. In addition, the defendant, TEXPAN, is a foreign corporation and its vessel, the TEXACO CARIBBEAN, was registered under the laws of Panama and, at the time of the alleged casualties, was being managed and operated by a British corporation.

Although TEXACO has been named as a defendant herein, it is submitted that TEXACO is not a proper party to this litigation. In any event, the policy behind any reluctance to dismiss a case brought by a United States plaintiff does not apply to a case brought against a United States defendant by a non-resident foreign alien on a foreign cause of action. The understandable reluctance to force an American to litigate his cause in a foreign court is irrelevant where the United States defendant asks that the case be dismissed in favor of a more convenient forum abroad. *Domingo* v. *States Marine Lines*, 340 F. Supp. 811 (S.D.N.Y., 1972). See also *De Sairigne* v. *Gould*, 83 F. Supp. 270 (S.D.N.Y., 1949), aff'd 177 F. 2d 515 (2nd Cir. 1949), cert. denied 339 U.S. 912 1950); *Poutos* v. *Mene Grande Oil Co.*, 123 F. Supp. 577 (S.D.N.Y. 1954); *Spencer* v. *Alcoa Steamship Company*, 221 F. Supp. 343 (E.D.N.Y., 1963), aff'd per curiam, 324 F. 2d 957 (2nd Cir. 1963).

In summary, there is no contact of the litigants with this forum to justify the assumption of jurisdiction by the District Court (A 377a). In fact, it is anomolous that the plaintiffs should seek out a jurisdiction entirely foreign to the issues involved and should seek a Court more than

3,000 miles distant from the scene of the alleged occurrence and their own homes solely on the ground that they have attorneys in the United States.

B. All the events giving rise to plaintiffs' claims occurred abroad; none of the evidence nor witnesses are in the United States; and all of the material witnesses are or will be available in England.

All of the occurrences and events out of which these suits arose occurred outside of this forum (A 377a). None of the material witnesses for either plaintiffs or defendants are United States citizens or residents (A 377a). In fact, most, if not all, of the material witnesses and evidence for defendant and most probably, plaintiffs, are located in England or will be available there in connection with the related litigation pending in England. Clearly, access to the sources of proof would be a relatively simple matter in England, which is the center of this controversy, while in the United States it would be extremely difficult, at best; if not impossible (A 364a-368a). These factors have consistently influenced the Courts in ordering the dismissal of cases, including the earlier admiralty cases, see, *e.g.*, *Charter Shipping Co.* v. *Bowring, Jones & Tidy Ltd.*, 281 U.S. 515 (1930); *Canada Malting Co., Ltd.* v. *Paterson Steamship Ltd.*, 285 U.S. 413 (1932); the more recent admiralty cases, *see, e.g.*, *Hatzoglou* v. *Asturias Shipping Company, S.A.*, 193 F. Supp. 195 (S.D.N.Y., 1961); *Scognamiglio* v. *Homes Lines, Inc.* 246 F. Supp. 605 (S.D.N.Y., 1965); *Domingo* v. *States Marine Lines*, 340 F. Supp. 811 (S.D.N.Y., 1972), and non-admiralty diversity cases, *see, e.g.*, *De Sairigne* v. *Gould*, 83 F. Supp. 270 (S.D.N.Y., 1949) aff'd 177 F. 2d 515 (2nd Cir. 1949), cert. denied 339 U.S. 912 (1950).

These factors are at the center of *forum non conveniens*. When the relevant events occur in a foreign country and the evidence and witnesses are there, the case clearly has "no connection with the district or, indeed, with the

country", *Hatzoglou* v. *Asturias Shipping Co., S.A.*, supra, 193 F. Supp. at 196, and has "its most significant contacts" with that foreign country, *Scognamiglio* v. *Homes Lines, Inc., supra*, 246 F. Supp. at 606. It is most convenient (and the interests of justice are best served) to litigate the cause where the events occurred and where the sources of proof are located.

It should also be noted here that because all of the material witnesses with respect to the subject casualty are located outside of the United States (the vast majority are in England), the District Court would be without power to compel the attendance of any of the material witnesses in this matter. Even were some of the material witnesses willing to testify, it seems apparent, without the necessity of detailed discussion, that the total cost of obtaining the testimony of such willing witnesses would be far less in England than in the United States. Furthermore, the witnesses themselves would be greatly inconvenienced in that, among other things, they would be forced to travel long distances and would be away from their jobs and families for long periods of time.

Moreover, because of the fact that litigation is already pending in England (A 82a), it would be extremely wasteful of judicial resources and unnecessarily and excessively expensive for the parties herein to be forced to litigate the same subject matter in two jurisdictions separated by more than 3,000 miles i.e., England and the United States, requiring dual presentation of evidence. Especially is this so where the alternative English forum is so readily accessible to plaintiffs and is already the situs of related pending litigation. See *Charter Shipping Co., Ltd.* v. *Bowring, Jones & Tidy, Ltd.*, 281 U.S. 515 (1930) where the fact that other actions pending in the foreign forum seems to have directly influenced the Court's decision.

In summary, the relative ease of access to sources of proof in England, the availability of compulsory process

for the attendance of unwilling witnesses at trial in England and its unavailability to this Court, and the tremendous reduction in the cost of producing willing witnesses at a trial in England, all favor the denial of jurisdiction by the District Court so as to relegate plaintiffs to their proper jurisdiction, which is England.

C. Defendants rights will be substantially prejudiced if plaintiffs are permitted to sue in this forum.

In addition to the aforementioned difficulties inherent in trying these suits in the Southern District of New York —with all evidence and material witnesses abroad, with the inevitable conflicts between jurisdictions arising from the presentation and the use of the same proofs in the English proceedings, another serious deficiency which would be highly prejudicial to the rights of the defendants herein is the fact that the Corporation of Trinity House, Naviera Maritima Fluvial, S.A., owners of the M/V PARACAS and the M/V PARACAS are all beyond the jurisdiction of this Court.

However, the above-mentioned indispensable parties are already parties in the actions pending in England.

It was established in *Gulf Oil Corp.* v. *Gilbert*, supra, 330 U.S. at 511, that one of the possibly disqualifying factors for a forum is the inability of the defendant to find and implead in such forum other parties directly involved in the controversy. See also *Fitzgerald* v. *Westland Marine Corp.*, 369 F. 2d 499, 501-02 (2nd Cir. 1966); *Spencer* v. *Alcoa Steamship Company*, 221 F. Supp. 343 (E.D.N.Y., 1963).

In the present cases, the absence from this forum of the above-named parties, including one of the three vessels directly involved in the subject casualties, leaves the defendants herein with no possibility of asserting any cross-claims, thereby seriously and disproportionately prejudicing defendants' rights.

As stated before, there are now pending in England several actions, all arising out of the subject casualties. The resolution of those actions will determine the question of the respective fault or liabilities of TEXPAN; the owners of the PARACAS; the owners of the BRANDENBURG; and the Corporation of Trinity House as between themselves.

In these circumstances, it would be manifestly unfair to retain jurisdiction in the United States in preference to the convenient and appropriate alternative forum in England; and retention in this jurisdiction would result in serious and unnecessary injustice and prejudice to the defendants herein, without any mitigating benefit resulting to plaintiffs.

These considerations indicate both the inappropriateness of the Southern District of New York as a forum called upon to finally and completely adjudicate all the rights of the parties and the efficacy of dismissing these actions in favor of the entirely convenient and available English forum.

D. Plaintiffs have a convenient and appropriate forum available to them in England; and it is an unwarranted and unnecessary imposition and burden upon this Court to have this litigation imported into the United States.

Plaintiffs have a substantially more appropriate and convenient forum in England than in the United States. Indeed, claimants asserting claims based on the same incidents (including the owners of the BRANDENBURG and her cargo) have already availed themselves of the appropriate remedy in the English Courts.

To permit plaintiffs to maintain these actions arising from an alleged foreign tort, involving the application of foreign law, would impose an unwarranted and unnecessary burden on this Court.

There can be no better examples of the situation described in *Gulf Oil, supra*, 330 U.S. at 508, 509, where the

Court viewed with disfavor, the piling up of litigation in congested centers instead of having them handled at the origin of the cause of the litigation, than these cases on appeal. No one could seriously contend that the origin of the cause of this litigation is anywhere other than England nor can anyone deny that the Southern District of New York is one of the most congested centers of litigation.

The Court expanded this argument stating there is local interest in having local controversies decided at home and it further states that it is an imposition to foist jury duty upon a community which has no relation to the litigation.

There is no good reason for these actions being brought in this District and it is respectfully submitted that in accordance with the settled law, jurisdiction in these actions was properly declined and the plaintiffs relegated to their proper and more convenient forum in England.

Furthermore, there are important advantages to plaintiffs in prosecuting their claims in England which are in striking contrast to the situation in New York. In England, they would have available directly the evidence to be offered by those indispensable parties and material witnesses who are not present in this jurisdiction, as well as having the opportunity to assert their claims against these additional indispensable parties.

It is further apparent that trial of this matter in England would not only be easier and less expensive for all parties concerned, but would facilitate economics in judicial resources and place the case where the public interest in this controversy lies. *Cf. Gulf Oil Corp.* v. *Gilbert*, supra, 330 U.S. at 508-09.

Insofar as any question concerning jurisdiction over TEXPAN in England is concerned, it is clear from the Affidavits of Mr. Dimock, Mr. Pointon and Mr. Harris that

TEXPAN is amenable to service of process in England, and is subject to the jurisdiction of the English Courts (A 75a, 80a, 86a). TEXPAN's vessels, whether owned or chartered, call there regularly. Therefore, it can be categorically stated that TEXPAN is sueable in England and that any judgment which might be recovered by plaintiffs can be satisfied in England. In any event, it was a condition of the District Court's dismissal of this matter that the defendants submit to the jurisdiction of the English Courts and waive any defense of the Statute of Limitations (A 379a).

E. The rights of all parties will be governed by foreign law and in this forum complex problems of choice of law would arise.

An important factor in cases dismissed on the grounds of *forum non conveniens* has been the fact that the rights of the parties would be determined by foreign law, see *Fitzgerald* v. *Westland Marine Corp.*, 369 F. 2d 499, 502 (2nd Cir. 1966); *Garis* v. *Compania Maritima San Basilio, S.A.*, 386 F. 2d 155, 157 (2nd Cir. 1967); *Scognamiglio* v. *Homes Lines, Inc.*, supra; *Hatzoglou* v. *Asturias Shipping Co., S.A.*, supra; although jurisdiction may be declined even where United States law is applicable, see *Canada Malting Co. Ltd.* v. *Paterson S.S. Ltd.*, supra. There are at least two reasons why this is relevant for consideration of *forum non conveniens*. First, in terms of actual convenience, resort to a forum where the law applied will be local eliminates the need for the use of expert witnesses on the interpretation of foreign law. *DeSairigne* v. *Gould*, supra. Second, the inapplicability of United States law (General Maritime Law, Jones Act, Death on the High Seas Act, New York Wrongful Death Act) and the applicability of foreign law is a further lack of contact of the case with United States courts. *Gulf Oil* v. *Gilbert*, supra, 330 U.S. at 509.

United States law is a total stranger to this foreign based collision. Under the choice of law standards applied in our Courts to maritime claims, it is clear that foreign law must be applied. *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382-83 (1959); *Lauritzen* v. *Larsen*, 345 U.S. 571, 582 (1953). Under the principles laid down in those cases, the contacts with England in the present cases would indicate that English law would govern virtually all aspects of the plaintiffs' claims. Application of any other law would seem inconsistent with the whole modern approach in the United States to these issues. RESTATEMENT, Second, CONFLICT OF LAWS §§ 6, 145 (Proposed Official Draft); *Romero* v. *International Terminal Operating Co.*, supra.

Under the modern choice of law rules which an American court would apply in these cases, the choice of the particular foreign law to be applied would have to be made for each precise issue before the Court. Moreover, except insofar as the forum's procedural law was applied, United States law would in no way be applicable and this Court would suffer the burden occasioned by the general applicability of foreign law, as compounded by the recurring choice-of-law problems. *Cf. Gulf Oil Corp.* v. *Gilbert*, supra, 330 U.S. at 509-512. These considerations further point to the undesirability of retaining these cases in this forum

F. The balance is clearly in favor of the defendants and therefore, plaintiffs choice of forum should not be allowed to stand.

Judge Kaufman's summary of the reasons for dismissing the complaint in *Fitzgerald* v. *Westland Marine Corp.*, 369 F. 2d 499, 501-02 (2nd Cir. 1966) is highly appropriate to the facts in the fourteen actions now before this Court:

> "We are moved, however, by the very compelling reason for dismissing the actions on the ground of *forum non conveniens*. Among the criteria elucidated by the Supreme Court in the *Gilbert* case as bearing

on the question of dismissal, are the ease of access to sources of proof, the availability of compulsory process and the costs of obtaining willing witnesses. The claim against Mitsubishi alleged negligent conversion of the San Patrick from a tanker to a bulk carrier. Nearly all of the witnesses whose testimony would be relevant to this question, however, are in Japan. No process to compel their tesetimony at a trial in New York is available; and, the cost of bringing willing witnesses here to testify is exorbitant. These same obstacles are present in the case of Pacific, which is accused of having negligently loaded the ship in Vancouver. Moreover, Pacific states that the loading was in fact done by Empire Stevedoring, Ltd., a Canadian corporation, which cannot be impleaded in the instant action.

"Finally, we note that New York has little connection with the accident which occurred off the coast of Alaska. In all probability, the district court would have to interpret Japanese and Canadian law in order to determine the liability of Mitsubishi and Pacific, and all of the deceased crewmen, with one possible exception, are foreigners. In light of all these factors we conclude that 'the balance is strongly in favor of defendant[s],' Mitsubishi and Pacific, and the district court did not abuse its discretion when it dismissed on the ground of *forum non conveniens*."

To recapitulate, applying the *Gulf Oil* factors discussed above to the facts of the case at bar, we find:

1. The private interest of all the parties concerned clearly point to England as the appropriate forum, the only contact with this jurisdiction being the presence of plaintiffs' attorneys herein.

2. All sources of proof are located in England or will be available in England in connection with the related litigation pending there.

3. This court will be without power to compel the attendance of any of the material witnesses involved. Even if such witnesses were willing to testify concerning the circumstances and events involved, the cost of obtaining such testimony would be by far less expensive in England.

4. An English Court would be in the most convenient position geographically to view the scene of the alleged occurrence.

5. There is no question that the English Courts have jurisdiction in this matter and any judgment obtained can be enforced there.

6. All the material witnesses, all indispensable parties, and all sources of proof are located in England. Therefore, the most convenient, inexpensive and expeditious forum would be in England.

7. There exists obstacles to a fair trial in the United States which would result in great prejudice to the defendants.

   Said obstacles being, amongst others, the absence of certain indispensable parties and all of the material witnesses necessary for a proper defense. On the other hand, there are advantages in holding the trial of this matter in England, in that prior litigation is pending there, all parties are present there and the Court would be in a position to render complete relief.

8. The interest of the "Public at Large" greatly favors a trial in England. The heavily congested docket of the District Court should not be further overburdened by the retention of these foreign based claims. In addition to the administrative burdens

that would be placed on the District Court, the Court would be faced with the difficult task of applying foreign law.

On the other hand, the English have a local interest in this matter involving the possible violation of established local traffic lanes and navigational routes in the English Channel. Furthermore, the English Courts would be applying for the most part, English law.

9. Plaintiffs' choice of forum, while a factor, is not controlling. This is particularly so when, as here, none of the operative facts occurred in the forum selected by plaintiff and the only connection appears to be the residence of plaintiffs' attorneys.

10. Plaintiffs, furthermore would be harassing defendants by causing said defendants to defend suits in multiple jurisdictions, separated by thousands of miles and thereby inflicting exorbitant expense, inconvenience and logistical problems upon defendant and witnesses; all of which are not necessary to plaintiffs' obtaining a just and fair adjudication of their rights, and which may result in inconsistent judgments.

It is apparent from all of the foregoing that the defendants meet all of the requirements of *Gulf Oil*, supra, as enunciated by the Supreme Court and that after weighing all the factors, the Magistrate properly found that:

> "There are most compelling reasons for dismissing the action and the balance is strongly in favor of defendants'." (A 378a)

POINT II

Plaintiffs have failed to establish that the District Court abused its discretion when it dismissed these actions and remitted plaintiffs to their proper forum in England.

The Supreme Court of the United States, in *Gulf Oil Corp.* v. *Gilbert*, supra, stated the following at page 508 regarding the discretion of the District Court in *forum non conveniens* matters:

> "Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. *The doctrine leaves much to the discretion of the court to which plaintiff resorts*, and experience has not shown a judicial tendency to remove ones own jurisdiction so strong as to result in many abuses."

This Court, in following the dictates of the Supreme Court, has on numerous occasions held that the question of whether to exercise jurisdiction or not is within the sound discretion of the District Court and that the exercise of that discretion will not be disturbed unless clearly abused. *Fitzgerald* v. *Westland Marine Corporation*, 369 F. 2d. 499 (2 Civ. 1966); *Koziol* v. *The Fylgia*, 230 2d. 651 (2 Civ. 1956).

As can be seen from the above, the decision whether to retain jurisdiction or to dismiss under the doctrine of *forum non conveniens* is one reserved to the sound discretion of the District Court and should not be disturbed absent clear evidence that it was abused. Therefore, plaintiffs must establish on this appeal that the District Court exercised its discretion on wrong principles or that it acted so absolutely contrary to the established law, that this Court would be justified in saying that it was exercised wrongly. *The Belgenland*, 114 U.S. 355, 368, (1885).

This the plaintiffs have clearly failed to do. Contrary to the assertions contained in plaintiffs' briefs, (1) the plaintiffs were granted full and complete discovery on the issue of *forum non conveniens*, the only issue which was before the Court and on which the plaintiffs were entitled to have discovery; (2) it was not necessary to have the defendants list specifically by name all of the witnesses involved in this matter along with a summary of their intended testimony because from the facts and circumstances surrounding this matter their geographical location was obvious. Furthermore, the Death on the High Seas Act has nothing whatsoever to do with this foreign based collision involving all foreign decedants and questions of navigation in the English Channel.

A. The District Court did not abuse its discretion in denying plaintiffs *further additional discovery* since full discovery was already had by it on the issue of *forum non conveniens*

Once again plaintiffs are attempting to resurrect arguments that have long been put to rest by careful, extensive, detailed consideration by the District Court.

As stated by attorneys for the plaintiffs (A 120a), these suits are based upon the alleged failure of the defendants to locate, mark or buoy the wreckage of the TEXACO CARIBBEAN—identified by plaintiffs' attorneys as the "central merits issue". Furthermore, the only issue before the Court on defendants' motion to dismiss was that of *forum non conveniens*. The Court did not have before it any issues regarding *in personam* jurisdiction or any questions regarding the merits of the actions.

Plaintiffs' attorneys nevertheless filed and served an extensive set of 92 interrogatories and requested the production of 17 sets of documents. Virtually all of the discovery requested was concerned with issues of *in personam* jurisdiction, dealt with the underlying merits of the actions

and involved numerous documents located in England and/or Monaco. None of the requested discovery was in any way relevant to the issue of *forum non conveniens*, which was the sole issue before the Court. Plaintiffs' discovery request amounted to no more than pure harassment and was merely an attempt to short circuit and avoid responding to defendants motion. In effect, plaintiffs were attempting to create the very problems which defendants' motion was designed to cure, and were attempting to bootstrap their way into Court. Plaintiffs were hoping by the use of such tactics to circumvent the motion to dismiss and place themselves in a position after discovery to claim that it would no longer be inconvenient to have a trial of the matter in this forum.

Defendants therefore made a motion for a protective order against such discovery (A 98a) and plaintiffs cross-moved to support their discovery request (A 106a). The Court referred both of these motions to the Magistrate and, upon the suggestion of the Court following a lengthy conference, plaintiffs withdrew the above requested discovery and served a revised set of 29 interrogatories (A 123a) and requested the production of 12 sets of documents (132a).

In support of their various discovery requests, plaintiffs' attorneys stated that "Discovery is need to learn the geographical location of vital evidence and witnesses" (A 120a). Nothing could be further from the truth. It is obvious from a review of the several affidavits submitted in support of defendants motion to dismiss that the geographical location of substantially all vital evidence and witnesses, including plaintiffs, was England. Furthermore, most of the revised request for discovery clearly went beyond the area of *forum non conveniens*.

Despite the fact that plaintiffs had all the information they could possibly require in order to respond to defendants' motion, they persisted in pursuing their harassing discovery requests. It was therefore necessary for the

Magistrate to hold a second lengthy conference during which each individual interrogatory and request for documents was discussed in detail. Based on the above-mentioned conferences and voluminous affidavits and letters submitted to him, the Magistrate reported to the Court on July 25, 1973, recommending that certain discovery be permitted (A 161a).

The Magistrate had the following comments to make regarding the character of the discovery request, the guidelines he would use and the net effect of the discovery he was permitting:

> "Many of the interrogatories clearly go to the merits and appear to be irrelevant to the questions presented on *forum non conveniens*. Typical of such items are interrogatory 15 which seeks copies or the substance of all reports made by employees of TOT; 22 which seeks the substance of all requests made by Texpan to locate or mark the wreck; document request 5 which seeks copies of all documents prepared or contributed by any survivors of the Texaco Caribbean; and 11 which seeks copies of all documents reporting upon any investigation 'into any of the circumstances relevant to the collissions'. However, in view of the importance of the actions and the position of plaintiffs as to the 'situs' of the likely evidence plaintiffs should now be afforded liberal discovery, but not broad discovery on the merits, as to the location of any witnesses who took part or made any decisions as to locating or marking or buoying the wreckage. With this guideline plaintiffs should be allowed the following discovery as to the interrogatories:" (A 164a-165a).

After setting forth the discovery that would be permitted, the Magistrate went on to state:

> "Except as to the above no further answers need be given. It is believed that the answers to the

interrogatories as revised will enable plaintiffs to explore fully the nature and location of witnesses and evidence." (A 166a)

He further went on to point out that there would be no need for production of documents if defendants' answers were accurate. However, in view of the fact that plaintiff desired to probe defendants' answers, in particular with regard to communications with Smit-Tak (A 166a), he ordered the defendants to produce copies of all such documents which they did.

That report was confirmed by the Court's order dated August 6, 1974 (A 176a) and was intended by the Court to cover all necessary discovery to which plaintiffs were entitled.

Despite defendants' full compliance with said order the plaintiffs were not satisfied. Defendants' attorneys were served with a Notice to Admit (concerned with events in 1967—some 3 years prior to the casualty) (A 180a) and Notices to Take the Depositions of defendants (A 177a; 186a); despite the fact that the Court had previously granted plaintiffs all appropriate discovery and had before it at the time the question of depositions and Notices to Admit.

Again, voluminous papers were submitted to the Magistrate and the Court both in support of and in opposition to the additional discovery. Based on those papers, the Magistrate issued a second report dated October 24, 1973, (A 232a) which was subsequently modified and as modified approved by the Court on November 15, 1973 (A 247a).

With regard to the question of depositions*, the Magistrate quite appropriately noted:

* It should also be noted that the persons sought to be deposed were not individuals whose testimony would be binding on the defendant corporations or who defendants would be required to produce under the law (A 229a-230a).

> "The undersigned is not persuaded that there is *any real possibility* that oral depositions will yield anything of significance, *beyond what is already known to plaintiffs*, bearing on the basic question of *forum non conveniens* (the present geographical location of witnesses and evidence." (A 235a) (Emphasis supplied)

With regard to the questions of both notice to admit and discovery, the Court order of November 15, 1973 quite appropriately stated as follows:

> "On the other hand, I find plaintiffs' request for additional discovery through a notice to admit and a notice to take depositions is clearly outside the scope of the order of August 6, 1973. There is nothing in the papers presented on this motion that calls for a modification of that order." (A 247a)

It is apparent from both the Magistrate's report and the District Court's order concerning discovery that plaintiffs had already been given complete and appropriate discovery herein.

It should be noted that the discovery issue consumed approximately eight months of the District Court's time, involving voluminous affidavits and letters, several lengthy hearings and two separte reports by the Magistrate.

A review of all the documents submitted on the discovery issue clearly indicates that plaintiffs were supplied with all discovery in any way possibly relevant on the issue of the geographical location of evidence and witnesses. Such a review also indicates, contrary to the false statements in Death Claimants' brief (Dc 20), that the subject dismissal was based not only on affidavits by individuals having personal knowledge but on the discovery which was granted by the District Court. The District Court, it is submitted, could not possibly have had more information before it regarding the location of witnesses and evidence than that which it had.

The cases cited by plaintiffs in support of their argument regarding discovery all deal with the question of service and/or in personam jurisdiction (see cases cited in Point II DC brief). As was stated to the Court below, the present matter does not deal with *in personam* jurisdiction or the underlying questions involved with the resolution of that issue. The sole issue to be determined by the District Court was whether or not the Courts of England provide a more convenient available forum.

Furthermore, the discovery devices provided by the Federal Rules of Civil Procedure were not designed to be used as a weapon or device to maneuver the adverse party into an unfavorable tactical position but to advance the disposition of controversies. *Aktiebolaget Vargos, et al* v. *Clark*, 8 F.R.D. 635 (D. of C. 1949). To facilitate that purpose, the application of the Rules was left to the discretion of the trial court as evidenced by the following language in *United States* v. *Kohler*, 9 F.R.D. 289 at 291 (ED of Pa. 1949):

> "[2] There is nothing mandatory about the discovery provisions of the Rules. On the contrary, the purpose and intent is evident throughout *to leave their application to the discretion of the trial court*— not, of course, an absolute discretion but one controlled and governed, not only by statutory enactments and the well established rules of the common law, but also by considerations of policy and of necessity, propriety and expediency in the particular case at hand." (Emphasis supplied)

As pointed out above, the District Court reviewed numerous detailed documents, held several lengethy conferences, and, in its sound discretion, properly entered the orders now being challenged by plaintiffs. A decision by this Court, reversing those orders, would amount to more than merely reviewing the District Court's discretion, it would have the net effect of substituting the views of this Court on the subject for the discretion of the lower Court.

B. Under the facts and circumstances herein, it is obvious that all material witnesses and evidence are located abroad.

Insofar as plaintiffs' arguments concerning the further identification of witnesses, it is sufficient to state that the location of possible witnesses in this action is one of those matters which, in the words of the Magistrate, "stand out in bold relief". (A 377a) It is obvious, from a review of all the relevant facts in this matter, that the vast majority of (if not all of) the witnesses including plaintiffs will be available in England. To require defendants to provide a detailed list of witnesses in order to prove the obvious would be an exercise in futility. As stated by Judge Weinfeld in *Noto* v. *Cia Secula di Armanento*, 310 F. Supp. 639, 648 (S.D.N.Y. 1970):

> "The Court does not act in a vacuum, but upon *a realistic appraisal of facts* in exercising its discretion." (Emphasis supplied)

This the District Court clearly did and is obvious from a review of the Magistrate's detailed and comprehensive report (A 360a). See also the case of *Domingo* v. *States Marine Lines*, 340 F. Supp. 811 (S.D.N.Y. 1972) where upon the application of the American defendant (principal place of business in New York) the court dismissed the action on the ground of *forum non conveniens* even though the defendant did not list it witnesses and the subject matter of their testimony because on balancing all the relevant factors on that issue it was clear that the action had no conceivable relation to this jurisdiction except for the fact that the defendant did business here.

It should also be noted here that plaintiffs never raised any such objection before the District Court or even mentioned it by way of implication. It is only now, for the first time on appeal, raising this makeshift argument.

C. Plaintiffs' arguments regarding the Death on the High Seas Act are erroneous and inapplicable to the situation at bar.

Death Claimant plaintiffs complain that they have been remitted to a forum unfamiliar with the statutory law of the United States and that the District Court therefore abused its discretion. However, plaintiffs' argument overlooks the fact that U. S. statutory law is a stranger to these actions. Regardless of which forum hears the matter, foreign law will govern the rights of the deceased German seamen's beneficial claimants. *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382-83 (1959); *Lauritzen* v. *Larsen*, 345 U.S. 571, 582 (1953); *Fitzgerald* v. *Westland Marine Corp.*, 369 F. 2d 499 (2nd Cir. 1966); *Domingo* v. *States Marine Lines*, 340 F. Supp. 811 (S.D.N.Y. 1972); *Noto* v. *Cia Secula de Armanento*, 310 F. Supp. 639 (S.D.N.Y. 1970).

The cases cited by plaintiffs in support of their arguments all involve application of the Jones Act. Those cases present situations entirely different and distinguishable, not only on their facts but in their underlying rationale. Not one case involving the Death on the High Seas Act has been cited by plaintiffs to support their contention that said Act is applicable to the situation at bar.

The Jones Act was designed as a piece of labor legislation to protect American seamen (or those likened to American seamen) from injuries incurred in the course of their employment—an employer-employee relationship being necessary for its application. See *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U.S. 783 (1949); *Fink* v. *Shipyard S.S. Co.*, 337 U.S. 810 (1949); *Dassigienis* v. *Cosmos Carriers & Trading Corp.*, 321 F. Supp. 1253 (S.D.N.Y. 1970), aff'd 442 F. 2d 1016 (2nd Cir. 1971); 2 Norris, *The Law of Seaman*, § 659, 670.

The whole basis or rationale behind the drastic extension of Jones Act coverage, was not to protect foreign

seamen from strangers who were not their employers, but to place on an equal footing with their bretheren, those likened to American seamen insofar as claims against their employers were concerned.

The situation at bar however, is entirely different. Here we are involved with claims by foreign seamen, not against their employers, but against total strangers who are also foreigners—foreign claimants who have no contact whatsoever with the United States and who are complaining about events which happened abroad in waters in which the United States has absolutely no interest. Furthermore, the present situation is concerned with three vessels which were all owned and operated by foreign corporations under foreign flags involving witnesses and evidence, all clearly located abroad.

As was stated by Justice Jackson, speaking for the Supreme Court in *Lauritzen*, supra, at page 590:

> "Under [plaintiffs'] contention, all that is necessary to bring a foreign transaction between foreigners in [foreign waters] under American law is to be able 'to serve American process on the defendant. We had held it a denial of due process of law when a state of the union attempts to draw into control of its law otherwise foreign controversies, on slight connections, because it is a forum state . . . Jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far-flung that there would be no justification for altering the law of controversy just because local jurisdiction of the parties is obtainable."

Furthermore, his remarks concerning the application of a United States statute at page 577 are particularly applicable:

> "By usage as old as the Nation, such statutes have been construed to apply only to areas and

> transactions in which American law would be considered operative under prevalent doctrines of international law."

And again, at page 578, it states:

> "And it has long been accepted in maritime jurisprudence that '. . . if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on International law, by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory'. Lord Russell of Killowen in Reg. v. Jameson (Eng.) (1896) 2 QB 425, 430, 12 ERC 227."

In summary, there is not one single American contact that plaintiffs can point to or one single American interest to be protected that would justify the application of the Death on the High Seas Act or any other United States Statute to the situation at bar.

POINT III

Brandenburg plaintiff's arguments regarding English and American law are erroneous and in any event do not establish abuse of discretion by the District Court.

Brandenburg plaintiffs argue in their brief that the Courts of England do not provide plaintiffs with a remedy and that therefore jurisdiction must be retained.

Plaintiffs argument, however, is erroneous and without merit because (1) English law does provide plaintiffs with a remedy—English law being basically the same as American law; (2) regardless of which forum hears the matter, English law would be applied and (3) it overlooks the fact that choice of law is only one of numerous factors to be weighed on the overall issue of *forum non conveniens.*

A. American law regarding the duty to locate and mark a wreck is basically the same as, and is derived from the English law.

An analysis of the two English cases cited by plaintiffs, *The Douglas*, [1882] 7 P.D. 151 and *The Utopia*, [1893] A.C. 492 indicates that the general rule in England is that after an owner relinquishes control and possession of a wreck to the cognizant governmental authority, the original owner is relieved of all *further* liability provided, however, that in the discharge of its duties such owner had not been guilty of wrongful conduct or neglect. Prior to such take over, however, the owner has the duty to protect other vessels and will be held liable for his negligence in carrying out that duty.

As stated by Lord Coleridge, C.J. in the *Douglas*, supra, at page 156:

> "The only question upon the evidence before us is whether the defendants were guilty of negligence;"

and further at page 158:

> "but sufficient evidence is before us to show that *all things reasonable were done;* there is no ground for finding that the master and the mate of the DOUGLAS were guilty of actionable negligence." (Emphasis supplied)

So also, Brett, L.J. held at page 160:

> "I incline to agree that if the owners of a wreck abandon it their liability ceases. But here the defendants claim the ownership of the wreck. It may be that the defendants did not hear of the accident for some time; as to those employed by them, the captain is prima facie to act; it is for the plaintiff to prove that there was negligence.

* * *

> Upon the evidence before us there was no negligence and no liability upon the defendants."

In the *UTOPIA*, supra, the Privy Council reviewed the DOUGLAS along with the other cases in point and summarized the liability of an owner of a wrecked vessel on page 498 as follows:

> "The result of these authorities may be thus expressed. The owner of a ship sunk whether by his default or not (wilful misconduct probably giving rise to different considerations) has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her. It is equally true that so long as, and so far as, possession, management, and control of the wreck be not abandoned or properly transferred, there remains on the owners an obligation in regard to the protection of other vessels from receiving injury from her. But in order to fix the owners of a wreck with liability two things must be shown, first, that in regard to the particular matters in respect of which default is alleged, the control of the vessel is in them, that is to say, has not been abandoned, or legitimately transferred, and, secondly, that they have in the discharge of their legal duty been guilty of wilful misconduct or neglect."

No statement is made anywhere in either of the two cases that mere notice to a governmental agency, *standing alone*, is sufficient to relieve the owner of liability for failure to mark—there must be evidence that the owner took all reasonable steps under the circumstances there present.

On the other hand a review of the leading American authorities on the subject, which incidentally cite with approval both *the Douglas*, supra, and *the Utopia*, supra, indicates that the general rule, just as in England, is that

an owner may comply with the duty to mark a wreck by getting the Coast Guard to do it and that when the Coast Guard does mark the wreck, whether properly or not, the owner is relieved of his duty in that respect. Further, that while he has a duty to mark a wreck, he is relieved of that duty when he has taken all reasonable steps under the circumstances then present. *The Plymouth*, 225 Fed. 483 (2nd Cir. 1915); *Red Star Towing & Transportation Co.* v. *Woodburn*, 18 F. 2d 77 (2nd Cir. 1927); *New York Marine Co.* v. *Mulligan*, 31 F. 2d 532 (2nd Cir. 1929); *The Snug Harbor*, 40 F. 2d 27 (4th Cir. 1930); *The Berwind-White Coal Mining Co.* v. *Pitney Eureka No 1107*, 187 F. 2d 665 (2nd Cir. 1951); *Morania Barge No. 140, Inc.* v. *M & J Tracy Inc.*, 312 F. 2d 78 (2nd Cir. 1962); *Humble Oil & Refining Company* v. *Tug Crochet*, 422 F. 2d 602 (5th Cir. 1970); *The Chambers*, 298 Fed. 194 (S.D.N.Y. 1924); *City of Taunton-Sunken Wreck*, 11 F. 2d 285 (E.D.N.Y. 1927); *Wilson* v. *Mitsui & Co.*, 27 F. 2d 185 (N.D. Cal. 1928).

In the case of *the Plymouth*, supra at page 484, this Court stated the following with regard to the duty of the owner:

> "It is quite obvious that if the Lighthouse Department had marked this wreck of its own motion, as it might have done, the Hartford Company could not have moved the buoy or interfered with it in any way, whether it thought it properly placed or not, and if the Hartford Company had itself buoyed the wreck the Lighthouse Department in the exercise of its governmental authority could have changed the location of the buoy or replaced it with another. We think the Hartford Company fully complied with the requirements of the act of 1899, when it secured the services of the Lighthouse Department. No wiser or safer course could be taken than to rely upon the resources and competency of the Lighthouse Department in such case.
>
> * * *

> *There is no American authority on the subject, but we think The Douglas, 7 Prob. Div. 151 (1882), exactly in point.*" (Emphasis supplied)

The *Berwind-White* case, supra, relied upon by plaintiffs to support their argument, does just the contrary. In that case, this Court specifically affirms its prior decision in *the Plymouth*, supra, when, during its discussion of an owner's duty cites *the Plymouth* with approval, twice, and states:

> "It has long been the law that an owner may comply with the statutory requirement for marking by getting the Lighthouse Department (Now the Coast Guard) to do it; when the Coast Guard does mark the wreck, whether properly or not, the owner is relieved of any statutory duty in that respect. The Plymouth, 2 Cir. 225 F. 483, certiorari denied, 241 U.S. 675, 36 S. Ct. 725, 60 L. Ed. 1232; New York Maritime Co. v. Mulligan, 2 Cir., 31 F. 2d 532; City of Taunton-Sunken Wreck, D.C.S.D. N.Y., 11 F. 2d 285, 1927 AMC 135; The Barge Chambers, D.C.S.D. N.Y., 98 F. 194, 1924 A.M.C. 572; Wilson v. Mitsui & Co., D.C.N.D. Cal. 27 F. 2d 185. The basis of this exception to the otherwise non-delegable duty is the fact that the private owner cannot interfere with the manner in which the government agency uses its discretion in the manner of marking. The Plymouth, supra."

It further goes on to indicate that if a Coast Guard search for the wreck is made with due diligence in light of the facts within the knowledge of the owner this too may operate to discharge the owner from his duty.

Summarizing and comparing the two statements of the law, it is clear that under either version, the owner of a wrecked vessel has the duty to protect other vessels from being damaged thereby by properly marking the wreck.

The manner in which the owner performs that duty under the particular factual circumstances present determines his liability in the matter—if performed negligently he will be held liable for all resulting damage and if performed properly, he will not.

Plaintiffs reliance on the case of *The Berwind-White Coal Mining Co.* v. *Pitney Eureka No. 1107*, Supra, and *Morania Barge No. 140, Inc. vs. M & J Tracy Inc.*, Supra, is misplaced. Both of those cases support the general principal of law stated above and are distinguishable on their facts alone. In both cases, the court was dealing with a wreck on U. S. navigable waters. The court found that the owners of the wrecks had done nothing for a period of time after having been notified of the wrecks and accordingly held them liable for negligence in failing to perform their duty under the wreck statute* to mark the wreck.

Under English law, the result in *Berwind-White* would have been exactly the same, i.e., the owner would be held liable for *its* negligence in failing to perform *its* duty. *The Utopia*, supra, at p. 498. It should be noted that plaintiffs in this action alleged that the defendant TEXPAN was negligent in performing its duty to locate and mark the wreck of the TEXACO CARIBBEAN and particularly so because it failed to engage the services of Smit-Tak in locating the wreck. If plaintiff can establish any negligence on the part of the owner of the TEXACO CARIBBEAN, as it alleges, during the trial of this matter, under the authorities cited the result would be the same regardless of whether English or American law is applied. Under either law, TEXPAN would remain liable for its own negligence until such time as the possession and control of the vessel was officially transferred to the proper authorities or until such time as the authorities *marked* the wreck. Mere notice would not be sufficient to relieve TEXPAN of its duty regardless of which law is applied.

* A statute which, it is contended, has no application to the case at bar since by its own terms it applies only to U.S. navigable waters.

In this regard, the Magistrate noted:

> "While the case [Utopia] recognizes that there is no liability on the owner for the default as such of the governmental authority it also recognizes that the owner is liable where there has been 'misconduct or neglect' on its part apart from the conduct of the authority. It should be noted that in the present situation plaintiffs do charge a failure on the part of defendants themselves to call upon Smit to locate and mark the wreck." (A 370a)

and further:

> "Berwind appears to recognize that if there is a marking by the Coast Guard, 'whether properly or not', there is no further liability. In this connection it is to be noted that defendants assert that the vessel Siren moored at immediate vicinity and displayed a warning which was not properly interpreted (Aff. Pointon, p. 4). Accepting the factual version of the defendants it may be argued that there was a 'marking' by the Siren and that under the claimed facts there would be no difference between the English law and the United States law." (A 372a)

He therefore properly concluded:

> "Thus, it is not clear that under plaintiffs' theory of liability or defendants' version of the sinking of the Brandenburg there is a difference between the English law and the United States law. It is also noted that plaintiffs stress that there was a failure to employ Smit-Tak to locate and mark the wreck and if this had been undertaken and accomplished the later Brandenburg wreck may not have occurred."

B. Regardless of which forum the matter is tried in, English law must be applied

As previously discussed in Point I hereof at page 17, United States law is a total stranger to this foreign based collision. Analyzing the factual situation in light of the choice of law standards applied by our courts, it is clear that foreign law must be applied. *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382-83 (1959); *Lauritzen* v. *Larsen*, 345 U.S. 571, 582 (1953).

Interestingly enough every case cited by plaintiffs involved wrecks on the navigable waters of the United States and application therefore of the Wreck Statute, 33 USCA § 409. Not one of the cases cited by plaintiffs involves a wreck on the "high seas" or the application of either the wreck statute or U.S. General Maritime Law to such a situation. This, it is submitted is only logical since a United States Court would have no reason to arbitrarily apply U.S. "wreck" laws to other than those bodies of water affecting U.S. navigation. On the other hand, the matter before the Court involves a wreck in the English Channel which while technically the high seas or international waters is more akin to the navigable waters of England—One of the countries having a direct interest in navigation and casualties occurring therein. In fact, England was instrumental in having passed the Dover Strait Traffic Separation scheme to regulate traffic in the Channel and it is Her Majesty's Coast Guard that supervises traffic in the Straits of Dover. All things being considered, it would be impossible to think of a country having a more direct interest in wreck removal in the English Channel. It would be just as arbitrary for an English court to apply English wreck law to wrecks affecting the navigable waters of the United States, as it would be for our courts to apply United States law to the facts and circumstances at bar.

C. Choice of Law is only one factor to be considered on the issue of *forum non conveniens* and even if English law is somehow less favorable than American law, that is not evidence of abuse of discretion.

Initially, it should be noted that the issue presented to the District Court for determination involved choice of forum (*Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 [1947] and its progeny) and *not* choice of law (*Lauritzen* v. *Larsen*, 345 U.S. 571 [1953] and its progeny); choice of law being only one of numerous factors to be considered in a *forum non conveniens* matter. See also, *Canada Malting Co.* v. *Paterson Steamship*, 285 U.S. 413 (1922) where Justice Brandeis stated at page 419:

> "We have no occasion to inquire by what law the rights of the parties are governed, as we are of the opinion that, under any view of the question, it lay within the discretion of the district court to decline to assume jurisdiction over the controversy."

Curiously enough the above quoted language is strikingly similar to that used by the Magistrate in his report (A 377a-378a).

Therefore, even were this court to find that the English law is somehow less favorable to plaintiffs than the American law, that fact standing alone is not evidence of the abuse of discretion required to be found to overturn the lower court's decision. Particularly in point here is the recent case of *Metallgesellschaft* v. *M/V Larry L.*, 1973 A.M.C. 2529 (D.C. So. Car. 1973). In that case the plaintiff argued, as do plaintiffs here, that the English law regarding cargoes recovery in a collision matter would charge the cargo plaintiff with the fault of its carrying vessel thereby severely limiting the amount of any recov-

ery, whereas under American law the cargo plaintiff would recover its damages in full. In response to that argument the court, quoting from Judge Hoffman in the case of *Anglo-American Grain Co., Ltd.* v. *S/T Mina D'Amico*, 169 F. Supp. 908 (E.D. Va., 1959), stated at page 2535:

> "... 'The variance between the law of the United States and the laws of other major shipping nations leads to efforts on the part of shipowners to avoid being sued in the United States, and like efforts on the part of cargo to institute actions in the United States.' "

and further stated:

> "He followed the lead of the Second Circuit in Western Farmer, supra, which treated as irrelevant the matter of the rights of cargo under American law as contrasted to its rights under the Brussels Convention of 1910, which the English Court would apply. He concluded, as I do, that the ultimate question is whether the defendant would be unfairly prejudiced by having to defend in this jurisdiction, and that the rights of cargo interests are not a factor to consider in determining the propriety of declining jurisdiction."

In summary, it is clear that under either plaintiffs' theory of liability or defendants' version of the sinking of the BRANDENBURG, there is no essential difference between the English and United States law. Furthermore, even if English law were less favorable in certain respects, this fact would not be controlling under all the circumstances here present.

CONCLUSION

The District Court gave careful, detailed consideration to the issues presented to it and properly applied the principles of *forum non conveniens* in reaching its decision to dismiss these actions and remit plaintiffs to their proper English forum.

There being no evidence of the District Court's having abused its discretion, this Court must, as a matter of law, affirm the decision below.

Wherefore, it is respectfully submitted that the decision of the lower court be in all respects affirmed.

Respectfully submitted,

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SERVICE OF THREE (3) COPIES OF THE WITHIN

Brief IS HEREBY ADMITTED

THIS 13 DAY OF Sept 1974

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